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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 ANDREY KOSTENKO, ) CASE NO. C07-0804-TSZ  
09 )  
Petitioner, )  
10 )  
v. ) REPORT AND RECOMMENDATION  
11 )  
ALBERTO R. GONZALES, )  
12 )  
Respondent. )  
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14 I. INTRODUCTION AND SUMMARY CONCLUSION

15 On May 25, 2007, petitioner Andrey Kostenko, proceeding through counsel, filed a  
16 “Petition for Writ of Habeas Corpus by a Person Facing Immediate Deportation and Request for  
17 Emergency Stay of Deportation,” pursuant to 28 U.S.C. § 2241. (Dkt. #1). Petitioner requests  
18 that the Court enter a stay of removal, restricting the United States Immigration and Customs  
19 Enforcement (“ICE”) from removing him from the United States before his Petition for a  
20 Governor’s Pardon and his Motion to Reopen with the Board of Immigration Appeals have been  
21 decided. *Id.*

22 Having carefully reviewed the entire record, I recommend that petitioner’s motion for stay

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01 of removal be denied and that this action be dismissed.

02 II. BACKGROUND AND PROCEDURAL HISTORY

03 Petitioner was born in Magadan, in the former Union of Soviet Socialist Republics  
04 (“USSR”) (now Russia), in 1977, and moved to Belarus in 1980. (Dkt. #1 at 6, 15). On or about  
05 April 21, 1992, he was admitted to the United States at New York, New York, as a refugee.  
06 (Dkt. #1 at 52). On May 19, 1994, petitioner adjusted his status to Lawful Permanent Resident  
07 retroactive to his date of admission. *Id.* On September 25, 1997, petitioner was convicted of  
08 possession of legend drugs, and was sentenced to 90 days in prison with 88 days suspended. (Dkt.  
09 #1 at 54). On October 6, 1997, he was convicted in Chelan County Superior Court of Attempted  
10 Theft in the Second Degree, for which he was sentenced to 37 days confinement, and Possessing  
11 Stolen Property in the Second Degree, for which he was sentenced to 365 days confinement with  
12 328 days suspended. (Dkt. #1 at 38-51).

13 On June 29, 1998, ICE issued a Notice to Appear, placing petitioner in removal  
14 proceedings, and charging petitioner with removability under Section 237(a)(2)(A)(iii) of the  
15 Immigration and Nationality Act, for conviction of an aggravated felony. (Dkt. #1 at 55). On July  
16 1, 1998, ICE issued Additional Charges of Removability, charging petitioner with removability  
17 under INA § 237(a)(2)(A)(ii), for conviction of two separate crimes involving moral turpitude,  
18 and under INA § 237(a)(2)(B)(i), for conviction of a controlled substance violation. (Dkt. #1 at  
19 53-54).

20 After a removal hearing, the Immigration Judge (“IJ”) denied petitioner’s application for  
21 asylum and withholding of removal, and ordered him removed to Belarus on October 28, 1998.  
22 (Dkt. #1 at 58-69). Petitioner appealed the IJ’s decision to the Board of Immigration Appeals

01 (“BIA”), who affirmed the IJ’s decision and dismissed the appeal on April 4, 2003. (Dkt. #1 at  
02 70). Petitioner appealed the BIA’s decision to the Ninth Circuit Court of Appeals, who dismissed  
03 the appeal for lack of jurisdiction on April 4, 2004. (Dkt. #1 at 71).

04 On May 25, 2007, petitioner filed the instant habeas petition and motion for a stay of  
05 deportation. (Dkt. #1).

### 06 III. DISCUSSION

07 The standard of review for a stay of removal is set forth in *Abbassi v. INS*, 143 F.3d 513  
08 (9th Cir. 1998); *see also Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (en  
09 banc)(concluding that § 1252(f)(2) does not limit the power of federal courts to grant a stay of  
10 removal). Under *Abbassi*, petitioner must show either: (1) the probability of success on the merits  
11 plus the possibility of irreparable harm, or (2) that serious legal questions are raised and the  
12 balance of hardships tips sharply in petitioner’s favor. *Abbassi*, 143 F.3d at 514. ““These  
13 standards represent the outer extremes of a continuum, with the relative hardships to the parties  
14 providing the critical element in determining at what point on the continuum a stay pending review  
15 is justified.”” *Andreiu*, 253 F.3d at 483 (quoting *Abbassi*, 143 F.3d at 514). If the applicant shows  
16 no chance of success on the merits, however, the injunction should not issue. *Arcamuzi v.*  
17 *Continental Airlines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987).

18 The Court finds that petitioner meets neither prong of the *Abbassi* test. Petitioner argues  
19 that his “procedural due process rights will be violated if he is deported without being given the  
20 opportunity to reopen his asylum case as well as the opportunity to obtain a Governor’s pardon  
21 for his theft convictions so he can obtain an expungement of the conviction for simple possession  
22 of a legend drug.” (Dkt. #1 at 2-3). Petitioner asks this Court to issue a writ of habeas corpus,

01 “commanding respondent to stay the deportation of the petitioner and commanding respondent  
02 to appear before this Court, so that this Court may further inquire into the lawfulness of  
03 respondents’ [sic] attempted removal and deportation of petitioner where petitioner is seeking to  
04 reopen his asylum case for new evidence and for such further relief to which petitioner may be  
05 entitled.” (Dkt. #1 at 3). Petitioner neither explains nor provides any support for his assertion that  
06 his removal should be stayed. Moreover, petitioner has not demonstrated that this Court has  
07 jurisdiction under the REAL ID Act to stay his removal pending a collateral claim before another  
08 court. The REAL ID Act amended the Immigration and Nationality Act, eliminating federal  
09 habeas corpus jurisdiction over final orders of removal. *See* Pub. L. No. 109-13, Div. B, 119 Stat.  
10 231 (May 11, 2005). Under Section 106 of the Act, “a petition for review filed with an  
11 appropriate court of appeals in accordance with this section shall be the sole and exclusive means  
12 for judicial review of an order of removal entered or issued under any provision of [the  
13 Immigration and Nationality Act].” 8 U.S.C. § 1252(a)(5). “A request to stay an order of  
14 removal based on a pending collateral claim does not escape the jurisdiction stripping provisions  
15 of the REAL ID Act.” *Mancho v. Chertoff*, 480 F. Supp. 2d 160, \*2 (D.D.C. 2007) (citing  
16 *Formusoh v. Gonzales*, No. 3-07-CV-0128-K, 2007 WL 465305 (N.D. Tex. Feb. 12, 2007)  
17 (dismissing for lack of subject matter jurisdiction habeas petition of petitioner seeking stay of  
18 removal pending resolution of an I-130 petition and an I-485 adjustment of status petition); *Tale*  
19 *v. United States Dep’t of Homeland Sec.*, 2006 U.S. Dist. LEXIS 47577, at \*1 (S.D. Tex. July  
20 13, 2006) (finding lack of jurisdiction to grant petitioner preliminary and permanent injunctions  
21 barring his deportation prior to the resolution of his claims pending before an immigration judge.)).  
22 Absent statutory or legal authority that creates an exception to the REAL ID Act, this Court lacks

01 subject matter jurisdiction over petitioner's request for a stay of removal during the pendency of  
02 his motion to reopen before the BIA, or his petition for clemency/pardon of his state convictions.  
03 Accordingly, because the Court is without jurisdiction to grant petitioner's requested relief, he is  
04 unable to show either a probability of success on the merits plus the possibility of irreparable harm  
05 or that serious legal questions are raised and the balance of hardships tips in his favor.

06 IV. CONCLUSION

07 For the foregoing reasons, I recommend that petitioner's motion for stay of removal, Dkt.  
08 #1, be denied, and that this action be dismissed for lack of jurisdiction. A proposed order  
09 accompanies this Report and Recommendation.

10 DATED this 30th day of May, 2007.

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12 Mary Alice Theiler  
13 United States Magistrate Judge  
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